

October 31, 2006

BY ELECTRONIC FILING
STATE OF MAINE CONNECTME AUTHORITY

Re: Comments of the New England Cable and Telecommunications Association, Inc.

Introduction:

The New England Cable and Telecommunications Association, Inc. (“NECTA”) is pleased to submit these Comments on the Proposed Rules of the ConnectME Authority implementing the Advanced Technology Infrastructure Act (“Act”). NECTA is a six-state regional trade association representing substantially all cable television companies providing broadband, telephone, and video service in Maine. The cable industry has actively participated and supported the work of the Maine Broadband Access Infrastructure Board and looks forward to working with the ConnectME Authority throughout this rulemaking. NECTA supports the efforts of the Governor and Legislature to bring broadband to rural Maine. The Comments set forth below highlight the need to ensure that private investment is encouraged and not compromised by government subsidies of overbuilds where broadband is already available. The mistakes of United States Department of Agriculture RUS Broadband Loan Program should not be repeated and NECTA is hopeful that with edits suggested herein the ConnectME Authority will successfully complete its mission.

Before addressing specifics of the Proposed Rules, NECTA offers some general observations. Projects to provide service to unserved areas should be given priority. The definition of “underserved” areas must be carefully crafted to ensure that no project is funded that would, in the words of the Act, “inhibit or impede private investment in any area or diminish the value of prior investment.” A pragmatic approach should be taken that encourages innovative solutions.

Section 1. Purpose

NECTA supports the portions of the Comments of the Telephone Association of Maine (TAM) that seek amendments to bring the language of the Rule more in harmony with the precise language of the enabling legislation.¹

Section 2. Definitions

NECTA concurs with the TAM comments that the definition of Communications Service in the proposed Rule must be replaced with the exact language of §9209(3). Wherever possible, the definitions in the Rule should mirror definitions in the Act.

Section 3. Required Filing of Data

The Act authorizes the Authority to collect data from communications service providers and any wireless provider that own or operate advanced communications technology infrastructure in the State concerning infrastructure deployment and costs, revenues and subscriber ship². This power should be used judiciously and any data requested should be limited to records kept in the ordinary course of business. The Authority is fortunate to have talented, experienced staff capable of collecting information from existing data sources without burdening participating companies.

NECTA has several additional recommendations. First, with respect to Section 3(A), all providers of communications services required to file a Form 477 with the FCC should also be required file copies of their FCC Form 477 with the Authority. The requirement should not be limited to broadband service providers. Second, again with respect to Section 3(A), NECTA agrees with the TAM recommendation to retain subsections (3)(a),(b), and (d) but to eliminate subsections (c), (e), and (f).

Section 4. Protection of Confidential Data

NECTA respectfully submits that all data collected should be automatically protected. The protection of competitively sensitive data is critical to the success of any business. It is even more important in the highly competitive field of data communications. While the Act provides that the authority may designate information as confidential under this subsection *only to the minimum extent necessary to protect the public interest or the legitimate competitive or proprietary interests of a communications service provider*³ (emphasis added), NECTA asserts that legitimate competitive or

¹ CHAPTER 665
H.P. 1471 - L.D. 2080

² §9207. Collection of data

³ §9207(1)

proprietary interests are at risk unless all data submitted by a communications service provider are automatically protected.

In recognition of the statutory makeup of the Authority, a second protection of competitive or proprietary interests was included. Pursuant to §9207(2) a communications service provider may request that confidential or proprietary information provided to the Authority under subsection (1) not be viewed by those members of the Authority who could gain a competitive advantage from viewing the information. The Rules should contain a provision wherein proprietary or competitively sensitive submissions are reviewed by independent third parties and or Authority staff.

Section 5 – Designation of Broadband Service and Eligible Areas

Satellite Data Services should be considered a Broadband Service

Proposed Section (5)(a)(4) requires “further affirmative finding” that satellite data services meet the criteria set forth in section 5(a) before being considered a broadband service.. Notwithstanding potential “latency” problems, satellite data service is a very viable, affordable solution to the very problem the legislature sought to address. At the public hearing the representative of Wild Blue testified that his service was available to virtually every home in Maine and on a national level reaches 100,000 subscribers. The official WildBlue website⁴ lists significant offerings that any Maine resident would prefer over dial-up if basing a purchase decision on other than price alone. According to the HughesNet website⁵ “Hughes Network Systems, LLC (HNS) is currently the largest satellite broadband Internet access provider to consumers in North America, with approximately 300,000 subscribers. While “latency” issues cannot be ignored, experience tells us that well funded profitable companies ultimately solve any technical problems that threaten the success of their businesses. Therefore, Section (5) (A) (4) should be eliminated from the rule.

⁴ <http://www.wildblue.com/aboutWildblue/qaa.jsp>

⁵ <http://ad.direc-way.us/tracker.php?t=6&gclid=CPG377mCiIgCFQcIHgodVm5BCQ>

The FCC's Definition of "Broadband" Should Replace the 1.5Mbps Threshold in Proposed Rule 5(A) (3)

The standard adopted in the proposed rule in subsection 5(A)(3) that a speed of 1.5 Mbps in at least one direction is the minimum speed to qualify as "broadband" should be replaced by the existing FCC definition of broadband. While the 1.5Mbps standard may be an appropriate target and could be used as a means of ranking proposals, many of the broadband solutions discussed at the public hearing fall below this standard. The Authority should allow itself flexibility and not adopt a rigid standard for defining broadband service that excludes some of the more creative solutions described at the public hearing.

Additionally, adopting a 1.5 Mbps standard would exempt providers of DSL from the requirement to file a copy of their Form 477 with the Authority. As stated above, *all* providers who file Form 477 should be required to file with the Authority.

Definition of "Underserved"

The Authority also should reexamine the proposed definition of "underserved area". As defined in Section 5(B) of the proposed rule, an unserved area is an area without broadband service or mobile communications service and in which a project to provide those services will not be completed within one year. However, NECTA believes that the proposed definition of an "underserved area" in Subsection 5(C) (1) (b) is so vague that virtually any location could be deemed to be "underserved."

The duties of the Authority set forth in §9204 of the Act are clear and should be followed:

The authority shall establish criteria that ensure that an area is not determined to be an unserved or underserved area if the effect of that determination would inhibit or impede private investment in any area or diminish the value of prior investment in advanced communications technology infrastructure within any area. Criteria established by the authority must include but are not limited to whether investment is planned in an area within a reasonable time.

Accordingly, no area should qualify or be defined as "unserved" or "underserved" if prior investment in advanced communications infrastructure in the area is would be diminished or future private investment would be impeded or impaired by new investment supported by ConnectME funds.

The Authority should consider a simple approach and define "underserved" as

“Any area where there is not one or more unaffiliated providers of broadband service that make broadband service available, or plan to make broadband service available within one year, in the aggregate, to at least 85% of the total number of homes located within such area broadband service having substantially the same maximum download and upload speeds, system latency, data rate restrictions, and reliability as a broadband service offered in the nearest urban [or suburban] area as defined by the U.S. Census Bureau.”

Section 6 – ConnectME Authority Support

Additional Guidelines on Disbursement Required

NECTA feels proposed Section 6 should be rewritten to create a rule that will encourage private investment and will assist a qualified provider of communications services in leveraging existing conditions into a viable business plan. The Authority should create additional requirements/guidelines before authorizing use of ConnectME funds by any provider. First, the Authority must determine that the provider has a viable business plan to bring broadband service to an unserved or underserved area. The business plan should contain a cost benefit analysis of providing broadband service to the proposed area, including indications of interest from customers. Second, the communications service provider must provide its own funding, that can be matched by ConnectME funds. Third, funding should be subject to a withdrawal cap so that one provider or project does not utilize most or all of the entire ConnectME funds, regardless of how long they have been paying into the fund. Fourth, as currently included in proposed Section 6(B), the Authority must determine that, without its action in providing ConnectME funds, the installation of advanced infrastructure to provide broadband services in an unserved or underserved area would not occur.

Eligibility for Underserved Areas

Under Proposed Section 6(A)(1), an area would be eligible as being unserved or underserved if less than twenty percent (20%) of the households in the area already had existing broadband coverage. However, allowing overbuilding in any area that already has broadband service devalues existing investment contrary to Section 9204. An applicant must bear the cost of building plant to reach unserved or underserved areas.

The Authority should do all in its power to avoid the mistakes made by the United States Department of Agriculture in the administration of its RUS rural loan program. The September 2005 U.S. Department of Agriculture Inspector General’s Audit Report on the RUS’ Broadband Grant and Loan Programs (OIG Report) found, this program has “not maintained its focus on rural communities without preexisting service” (OIG Report at ii). Instead, it is largely being used to subsidize competition in areas where one, and in many cases, multiple providers of broadband service, exist. Thus it is critical to define underserved areas in a manner that does not lead to similar results.

NECTA also submits that proposed Section 6(A)(2)(a-c) is contrary to the spirit of the statute to bring broadband service to areas of the state that do not have service. Limiting access to ConnectME funds to census tracts with more than 100 people per square mile, and roads that have more than 500 cars per day disqualifies a great majority of the geographic area of the state. By narrowly focusing eligibility to areas that meet these criteria, the Authority inappropriately incents existing wireless providers to “fill in” their existing coverage using ConnectME funds rather than extending service to more sparsely served areas.

With respect to proposed Section 6(B), where an applicant has committed to complete a project within one year and does not, the Authority should be mindful that factors beyond the control of the party making a commitment in good faith could make it impossible to perform. Two that come to mind are weather and the ability of pole owning utilities to process and perform make ready work necessary for facilities based providers to extend their lines.

Section 7. ConnectME Fund

Assessment is required on Amounts “Collected or Received”

Section 9211(2) authorizes the Authority to require every communications service providers to contribute to the ConnectME fund on a “competitively neutral basis.” The assessment may not exceed 0.25% of the in-state retail revenue received or collected from all communications services provided to a location in Maine by communications service providers. The statutory language is clear that the legislature intended the fee to be assessed on amounts collected, not billed, a critical difference. Funds that are not actually collected by a communications service provider are not revenue. Accordingly, Section (7) (B) (1) of the proposed rule should be replaced with the language in §9211(2).

Internet Tax Freedom Act Prohibits Assessment of Fees on Internet Access

As has been made clear during this process, federal law precludes the assessment of any fee on Internet services, including cable high-speed Internet services. On October 21, 1998, Congress⁶ enacted the Internet Tax Freedom Act (“ITFA”).⁷ The ITFA is legislation designed to protect consumers and businesses who use the Internet from “multiple, confusing, and burdensome” state and local taxes and to encourage the continued growth of the Internet.⁸ The ITFA initially imposed a three-year moratorium, beginning October 1, 1998, on new state and local taxes on Internet access and on

⁶ Bi-partisan legislation that was sponsored by Representative Chris Cox (R-CA) and Senator Ron Wyden (D-OR).

⁷ Pub. Law No. 105-277, Div. C, Title XI, §§ 1100 to 1104, 112 Stat. 2681-719 (1998) (current version at 47 U.S.C. § 151 note).

⁸ LeFevre, *The Federal Internet Tax Freedom Act*, Minn. House of Reps. Research Dept. (1998).

multiple or discriminatory taxes on electronic commerce. Since its enactment, the moratorium has been twice extended by Congress and most recently extended in 2004 by the Internet Tax Nondiscrimination Act. While it is now set to phase-out on November 1, 2007, two bills were recently considered would make the moratorium permanent and phase out the grandfathering clause. Given its bipartisan support, it is likely Congress will act to extend the moratorium before the current extension expires.

High-speed Internet access, including that which is provided by the cable industry, falls squarely within the provisions of the ITFA moratorium, prohibiting the assessment of the ConnectME fee on Internet service. While there are several exceptions to the moratorium imposed by the ITFA, none applies to the ConnectME fee.⁹ For these reasons, the Connect ME fee cannot be assessed on the cable industry's high-speed Internet products.

Finally, under Section 9211(2) a facilities-based provider of wireless voice or data retail service may voluntarily agree to be assessed by the authority as a communications service provider. The Authority should amend the proposed rules to require a minimum period of contribution prior to use of ConnectME funds.

Conclusion:

NECTA members are committed to building out broadband capabilities within their franchise area footprints, consistent with line extension policies. Last year Governor Baldacci recognized the commitment of NECTA member Time Warner Cable to provide broadband coverage to 90% or more of homes in its expanding service area. These build out expansion goals extend to Adelphia Cable system assets in Maine which Time Warner Cable recently acquired. Bee Line Cable, a company started in the 1950s by the late cable pioneer Owen Hannigan, is aggressively rolling out broadband in Skowhegan, Anson, Farmington and other rural towns. Polaris Cable Services has been providing high speed Internet access in Houlton and Hodgdon for three years, recently expanded to Medway, Monticello, Littleton and Bridgewater, and plans to expand to Danforth, Patten, Howland, Enfield and Passadumkeag. Comcast, though not a dominant provider in Maine, is a world leader in technological innovation and has a demonstrated history of aggressively building out advanced broadband facilities. Cable companies large and small recognize the need to extend their facilities to offer advanced broadband services. We look forward to working with the Authority as its work progresses.

⁹ It is clear the ITFA prohibits "taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998." Section 1104(a)(1) [47 U.S.C. Section 151 note.

Comments of the New England Cable & Telecommunications Association, Inc.
ConnectME Authority
October 31, 2006
Page 8 of 7

Respectfully Submitted

William D. Durand
Executive Vice President
Chief Counsel
New England Cable & Telecommunications
Association, Inc.